No. 89-1597

FILED
MAY 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1989

GENERAL ACCIDENT FIRE & LIFE ASSURANCE CO.,
Petitioner,

v.

I.T.T. GENERAL CORPORATION

AND

ELECTRONICS CORP. OF AMERICA,
Respondents.

BRIEF IN OPPOSITION FOR RESPONDENT I.T.T. GENERAL CORPORATION

Allan C. Molotsky
William F. Sullivan, Jr.
POST & SCHELL, P.C.
Attorneys for Respondent
I.T.T. General Corporation
1800 J.F. Kennedy Boulevard
19th Floor
Philadelphia, PA 19103
(215) 587-1000

Member of the Bar of The Supreme Court of the United States

PACKARD PRESS LEGAL DIVISION 1617 JFK BOULEVARD PHILA. PA 19103 (215) 563-9000

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

1. Did the courts below fail to give proper regard to the statutes and decisions of the appellate courts of Pennsylvania in holding that the Pennsylvania four year statute of limitations barred the insurance company petitioner's subrogated causes of action for contribution or indemnity for a judgment against its insured?

Listing Naming Affiliates of Respondent Corporation:

The correct name of respondent is ITT General Corporation. Respondent has no parent, subsidiary which is not a wholly owned subsidiary, or other affiliate within the meaning of Rule 28.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATUTES INVOLVED	iv
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
A. THE COURTS BELOW WERE CORRECT IN ENTERING JUDGMENT AGAINST PETITIONER ON THE GROUND THAT ITS CLAIMS WERE BARRED BY THE FOUR YEAR PENNSYLVANIA STATUTE OF LIMITATIONS	5
B. THE COURTS BELOW DID NOT IGNORE ANY RELEVANT DECISION OF THE STATE COURTS	11
C. THERE IS NO SPECIAL OR IMPORTANT REASON WHY THIS COURT SHOULD GRANT THIS PETITION BECAUSE NO FEDERAL QUESTION IS INVOLVED AND THERE IS NO CONFLICT BETWEEN THE DECISION HERE AND ANY OTHER DECISION OF THE STATE OR FEDERAL COURTS ON THE QUESTION PRESENTED	12
CONCLUSION	14

TABLE OF AUTHORITIES

Cases: Page

Crisanti v. J.H. Beers, Inc., 297 Pa. Super. 337, 443 A.2d 1150, 1152 (1982) 6

Frangos v. Doering Equipment Corp., 860 F.2d 70 (3rd Cir. 1988) 10

Gabriel v. O'Hara, 368 Pa. Super. 383, 534 A.2d 488 (1987) 8, 10, 11-13

Mack Trucks Co., Inc. v. Bendix-Westinghouse Auto. A. B. Co., 372 F.2d 18, 20 (3rd. Cir. 1967) 7

Pa. Nat. Mut. Ins. v. Nicholson, 374 Pa. Super. 13, 542 A.2d 123 (1988), *appeal denied*, 555 A.2d 125 (1988) 6, 9, 10

Scetz v. Land Tool Co., 355 Pa. Super. 230, 513 A.2d 403, 407 (1986) 6, 10

Thermo-King Corp. v. Strick Corp., 467 F.Supp. 71 (W.D. Pa. 1979), *affirmed*, 734 F.2d 3, 9 (3rd Cir. 1984) 6

STATUTES

42 *Pa. C.S.A.* § 5524 ..... 5, 8-10

42 *Pa. C.S.A.* § 5525 ..... 5, 10

42 *Pa. C.S.A.* § 5527 ..... 5, 7, 9

42 *Pa. C.S.A.* § 201, *et seq.* 8

AUTHORITIES

18 Am. Jur. 2d, *Contribution*, § 1201, p. 105 (1954) 7

Pennsylvania Bar Association Judicial Code Explanation, 42 *Pa. C.S.A.* xv (1981) 7

STATUTES INVOLVED

Subchapter B, *Pennsylvania Consolidated Statutes Annotated* sections 5525(4) and 5527

42 *Pa. C.S.A.* § 5525:

> The following actions and proceedings must be commenced within four years:
>
> . . . .
>
> (4) An action upon a contract implied in law, except an action subject to another limitation specified in this Subchapter.

42 *Pa. C.S.A.* § 5527:

> Any civil action or proceeding which is neither subject to another limitation specified in this Subchapter . . . must be commenced within six years.

No. 89-1597

IN THE

Supreme Court of the United States

October Term, 1989

GENERAL ACCIDENT FIRE & LIFE ASSURANCE CO.,
Petitioner,

v.

I.T.T. GENERAL CORPORATION

AND

ELECTRONICS CORP. OF AMERICA,
Respondents.

BRIEF IN OPPOSITION FOR RESPONDENT I.T.T. GENERAL CORPORATION

STATEMENT OF THE CASE

An action for personal injuries suffered as a result of of an oil burner fire was brought against petitioner's insured (R.137a, R.171-3a) but petitioner disclaimed and refused to defend. (R.7-8a, R.229a). The insured thereupon instituted a declaratory judgment action against petitioner. R.8a. Judgment was entered against the insured in the personal injury action on June 21, 1983. R.141a.

Judgment was ultimately entered against petitioner in the declaratory judgment action requiring it to pay its insured $630,142, and that amount was paid by petitioner on October 2, 1987. R.241-2a; R.8-9a.

Petitioner then brought this action against Respondents on August 23, 1988, five years and two months after entry of the judgment against its insured, alleging that each of them manufactured and supplied defective components of the oil burner and that each was negligent in failing to provide adequate instruction with respect to its component, and seeking contribution or indemnity from respondents for the judgment against petitioner's insured and the R.9-11a.

The District Court entered summary judgment against petitioner and in favor of respondents on the ground that petitioner's claims were barred by the Pennsylvania four year statute of limitations applicable to an action upon a contract implied in law because those claims accrued upon entry of judgment against petitioner's insured in the underlying action more than five years before the commencement of this action. The District Court rejected petitioner's contention that the six year statute, applicable only to actions which are not subject to any other limitation, was the appropriate period of limitation. Opinion, App. pp.6-9. The District Court also rejected respondent's contention that petitioner's claims were also barred by the two year statute applicable to any action to recover damages for injury to person or property which is founded on negligence, intentional, or otherwise tortious conduct. *See* Opinion, App. p.5.

Petitioner appealed, and the United States Court of Appeals for the Third Circuit entered a Judgment Order affirming the District Court without oral argument or opinion on December 21, 1989. App. pp.1-2.

Petitioner's Petition for Rehearing, filed on January 3, 1990, was denied by the Circuit Court on January 19, 1990. Order, App. pp 11-12. This Petition for a Writ of

Certiorari was filed April 9, 1990 and received by Respondent on April 9, 1990.

Petitioner seeks this Court's intervention by asserting that the courts below ignored a decision of the Pennsylvania intermediate appellate court in holding that the four year limitation period applied to bar petitioner's claims. Respondent contends that the courts below were correct in holding that petitioner's claims were barred by the Pennsylvania statute of limitations, and that the decision which petitioner claims was improperly ignored is not applicable to this case and was not ignored by the courts below because it was not cited to them until after this judgment was affirmed on appeal.

SUMMARY OF ARGUMENT

The Circuit Court was correct in affirming the District Court's entry of summary judgment against petitioner on the ground that petitioner's subrogated claims for contribution or indemnity for a judgment against its insured were barred by that section of the Pennsylvania statute which provided a four year period of limitations or an action upon a contract implied in law. The judgment entered was in accord with the statute and the language of prior decisions of the federal and state courts, and was not in conflict with any decision of a similar issue. Petitioner conceded in the courts below that its action was one based upon a contract implied in law to which the four year limitation applied.

The opinion of the District Court shows that all of the arguments and authorities relied upon by petitioner here were considered, and rejected.

Petitioner asserts as the only ground for review by this Court that the Courts below failed to have proper regard for the decision of an intermediate state appellate court which was never cited to the District Court and not cited to the Circuit Court until after this judgment was

affirmed, and which did not involve the section of the statute held to be applicable here.

There is no special or compelling reason why this Court should exercise its discretion to review this case, and this Petition should be denied.

ARGUMENT

A. THE COURTS BELOW WERE CORRECT IN ENTERING JUDGMENT AGAINST PETITIONER ON THE GROUND THAT ITS CLAIMS WERE BARRED BY THE PENNSYLVANIA FOUR YEAR STATUTE OF LIMITATIONS.

Subchapter B of the Judicial Code, effective in June of 1978, codified the then existing statutes of limitation and modified them by removing causes of action based upon a written contract from the six year statute, 42 *Pa. C.S.A.* § 5527, and placing such causes of action within the four year period of 42 *Pa. C.S.A.* § 5525, by adding new sub-section 5525(3) including oral contracts within the four year limitation period, and by adding new sub-section 5525(4) which is at issue here and which provided that actions on a contract implied in law were within the four year limitation period.

The Judicial Code was then amended in 1982, effective in February of 1983, by adding a new subsection (7) to section 5524 which included in those causes of action to which the two year limitation applied any actions to recover damages for injury to person or property founded upon negligence, intentional, or otherwise tortious conduct, including deceit and fraud, except an action which was subject to another period of limitation specified in Subchapter B. The 1983 amendment also removed all of the previously specified actions which had been within the six year period under section 5527 to other sections and left section 5527 to apply only to actions which did not fall within any of the other provisions of the Subchapter.

The purposes of the revision of the statutes of limitations effected by the Judicial Code in 1978 and the 1983 amendment were to further the policy of applying shorter periods of limitation to claims which were dependent upon oral testimony and factual evidence which is subject to loss through lapse of time and diminution of memory, and to apply the same period of limitation to actions based upon similar facts, and to establish a single period of limitation for related actions whenever possible. *Crisanti v. J.H. Beers, Inc.*, 297 Pa. Super. 337, 443 A.2d 1150, 1152 (1982); see The Pennsylvania Bar Association Judicial Code Explanation, 42 Pa.C.S.A. xv (1981).

Although no Pennsylvania appellate court has yet had occasion to consider the application of the Judicial Code provision that contracts implied in law were subject to the four year statute of limitation, the Superior Court of Pennsylvania has treated an action for contribution which accrued before the effective date of the Judicial Code as one "which sounds in contract rather than tort law." *Pa. Nat. Mut. Ins. v. Nicholson*, 374 Pa. Super. 13, 542 A.2d 123 (1988), *appeal denied*, 555 A.2d 125 (1988). The District Court properly considered the Superior Court's treatment. Opinion, App. p. 7.

In *Thermo-King Corp. v. Strick Corp.*, 467 F.Supp. 71 (W.D. Pa. 1979), *affirmed*, 734 F.2d 3, 9 (3rd Cir. 1984), the court held that a counter-claim for indemnity for settlement of a strict liability claim for a defective product was contractual in nature. In *Svetz v. Land Tool Co.*, 355 Pa. Super. 230, 513 A.2d 403, 407 (1986), the court concluded that contribution was enforceable as an equitable duty. In *Mack Trucks Co., Inc. v. Bendix-Westinghouse Auto. A. B. Co.*, 372 F.2d 18, 20 (3rd. Cir. 1967), the court held that a claim for contribution to a settlement of a strict liability claim was subject to the Florida statute of limitation applicable to an action upon a contract not founded upon an instrument in writing

and was therefore barred. The District Court properly considered the reasoning of these cases in reaching its decision.

Petitioner conceded in the District Court that its claims for contribution and indemnity were subject to the statute of limitations applicable to contracts implied at law, but simply ignored the change made by the Judicial Code in placing such claims within the four year statute, arguing in its Memorandum of Law in opposition to Motion for Summary Judgment:

> Thus, in the absence of a particular statute specifying the statute of limitations for an action in contribution, an action in contribution is 'held to be governed by the statute of limitations applicable to actions based on implied contracts,' since, for the purposes of limitations, the action may be regarded as one for the debt not evidenced by writing, or as one to recover, upon an implied promise, money paid for the defendant's benefit.' 18 Am. Jur. 2d, *Contribution*,
>
> § 101 at 105 1974.
>
> Under Pennsylvania Law, this falls within the six year statute. 42 *Pa. C.S.A.* § 5527.

Memorandum of Law, pp. 7-8.

The District Court properly noted the concession that petitioner made before that court. Opinion, App. pp. 7-8.

Petitioner also conceded in the Circuit Court that its claim was based upon " an implied contract of indemnity." (Brief, p. 7) and that it ". . . is an implied contract of indemnity which lies at the heart of this case." Brief on Appeal, pp.9-10.

Petitioner cites no valid authority for the proposition that the six year limitation period of section 5527 is applicable. Petitioner relies here chiefly upon the Pennsylvania Superior Court decision in *Gabriel v. O'Hara*,

368 Pa. Super. 383, 534 A.2d 488 (1987), but that case is not authority for application of the six year limitation period here. In the *Gabriel* case, the court held that the trial court erred in dismissing a complaint under The Pennsylvania Unfair Trade Practices and Consumer Protection Law (73 *Purd. Stat. Ann.* § 201 *et seq.*) on the ground that the facts averred most closely resembled an action for fraud or deceit which was subject to a two year limitation under sub-section (7) of the two year statute, section 5524. The Superior court concluded that sub-section (7) could not be applicable because, as part of the 1982 amendment effective in February of 1983, it was not applicable to the causes of action which accrued in 1980. The court then rejected the contention that the factual bases for the claims averred should be examined and the period of limitation applicable to each claim averred should be applied separately, holding that only one period of limitation was to be applied to all of the multifarious claims which could be made under the act. The court then concluded that because all of the claims potentially viable under the act could not be characterized as fraud or deceit and because the act created a multitude of separate and distinct claims and prescribed different types of remedies without providing for any limitation period, the six year 'catch-all' provision should be chosen as the applicable one in order to effectuate the broad remedial policies of the legislature in enacting the Act and to ensure that consumers injured by unfair or deceptive practices may pursue their rights under the Act.

That decision does not in any way apply here, where there is no claim under any statute covering a wide variety of types of claims and prescribing different types of remedies for them. The claims here are claims firmly rooted in common law, and are the subject matter of the Judicial Code and its amendments which constitutes the statute governing the periods of limitation which are to be applied to such claims. Moreover here the statute

directs that the court look to the basis of the action by providing that the four year period is applicable to "an action *upon* a contract implied in law" (§ 5525(4)), or any action which is *founded on* negligence, intentional or otherwise tortious conduct or any other action or proceeding *sounding in* trespass, including deceit or fraud (§ 5524(7)).

Petitioner's reliance upon the other cases it cites is also misplaced. In *Pa. Nat. Mut. Ins. v. Nicholson Const., supra*, the court held that an employer's cause of action for contribution against a tortfeasor which had caused personal injury to an employee arose at the time judgment for contribution for compensation payment was entered in 1977 rather than when the employee's compensation claim was reinstated and the employer made additional payments in 1984, and that an action brought in 1985 eight years after it accrued in 1977 was therefore barred. The appropriate period of limitation was not at issue; all parties agreed that the the six year period was the applicable one. 542 A.2d at 126. Moreover, the six year period was the correct period since the cause of action involved there accrued prior to the enactment of the Judicial Code and the new four year period for contracts implied in law established by section 5525(4) of the Judicial Code. The District Court correctly recognized the inapplicability of the *Nicholson* case. Opinion, App. p.7, footnote 2.

Petitioner relies upon a footnote *en passant in Frangos v. Doering Equipment Corp.*, 860 F.2d 70 (3rd Cir. 1988) in which the court summarily rejected the obviously insupportable contention that amendment of a cross-claim made in pending proceedings against a co-defendant which had settled was barred by the six year statute of limitations, in a case in which there had been no judgment of liability and the action against both defendants was still pending. The cause of action for contribution had not even accrued at the time that it was contended to have been barred.

The District Court properly considered and cited the *Nicholson* and *Svetz* cases and the petitioner's own arguments in reaching the correct conclusion that petitioner's claims for contribution and indemnity were subject to the four year period of limitation applicable to contracts implied in law and were therefore barred. The Circuit Court was correct in affirming the judgment against petitioner and this Petition should be denied.

B. THE COURTS BELOW DID NOT IGNORE ANY RELEVANT DECISION OF THE STATE COURTS.

The District Court's Opinion, App. pp. 3-9, considered and discussed all of the cases which petitioner cites to this Court in contending that the courts below erred in applying the four year statute of limitations to bar petitioner's claims except the *Gabriel* case. The District Court did not discuss that case because petitioner did not cite it to the District Court. The decisions relied upon or discussed by the District Court bearing on the issue which it decided were all cases applying state law, and the District Court applied the state statute. The Opinion shows on its face that the District Court ought to and did apply state law.

The Circuit Court affirmed by Judgment Order, stating that it considered the contentions raised by petitioner, but without opinion. App. pp. 1-2.

There is no basis for the petitioner's present contention that the courts below ignored the governing state statutes or decisions where all of the decisions cited below and all of the relevant sections of the statute at issue were discussed and applied.

Petitioner may not rightly complain that the courts ignored a decision where the petitioner failed to cite that decision to the District Court or in its brief to the Circuit Court on appeal.

C. THERE IS NO SPECIAL OR IMPORTANT REASON WHY THIS COURT SHOULD GRANT THIS PETITION BECAUSE NO FEDERAL QUESTION IS INVOLVED AND THERE IS NO CONFLICT BETWEEN THE DECISION HERE AND ANY OTHER DECISION OF THE STATE OR FEDERAL COURTS ON THE QUESTION PRESENTED.

No special or important reasons for the exercise by this Court of its discretion to review this case on a writ of certiorari are present here. No federal question is involved. No conflict between the decision of the courts below and any other decision of any federal court is advanced.

Petitioner merely asserts that the District Court's ruling was "a disregard for the Pennsylvania Superior Court decision of *Gabriel vs. O'Hara*, [supra] . . . ." and that ". . . by ignoring the case of *Gabriel vs. O'Hara*, the District Court and now the panel has violated the principle that a Federal tribunal must give the decisions of state intermediate appellate courts 'proper regard.' " Petition, REASONS FOR GRANTING THE WRIT, p. 3.

The decision referred to is not in conflict with the decision here; the *Gabriel* case held only that the six year rather than the two year period of limitations applied to all of the varied claims which could be made under the state consumer protection law. That holding is not in conflict with the holding in this case that a subrogated claim for contribution or indemnity from other tortfeasors is subject to the four year limitation applicable to contracts implied in law under a separate section of the statute. *See* pages 8-9 *infra*.

The assertion that the courts below ignored the *Gabriel* decision is unfounded; petitioner failed to cite that decision to the District Court and did not cite that decision to the Circuit Court in its Brief on appeal. The *Gabriel* case was not cited until petitioner filed its

Petition for Rehearing, after the Circuit Court had affirmed the entry of judgment.

If petitioner had so little regard for the *Gabriel* case as to fail to cite it before the judgment here was affirmed, this Court should not be asked to intervene and to hold the courts below in violation of the requirement that they afford proper consideration to decisions of the state courts in applying state law for failing to consider what they were not properly asked to consider.

There is, of course, no indication that the Circuit Court panel did not consider the *Gabriel* decision and all the arguments now made by petitioner. Petitioner's argument in this Petition in all of sections 1 through 3, pages 3 through 10, is only a verbatim repetition of the argument in its Petition for Rehearing, and it cannot be assumed that the panel did not consider the Petition for Rehearing before rejecting it.

CONCLUSION

The Circuit Court was correct in affirming the entry of summary judgment by the District Court against petitioner on the ground that the four year period of limitation applicable to contracts implied in law barred petitioner's subrogated claims for contribution to or indemnity for a judgment rendered against the insured more than five years before the commencement of this action. The District Court applied both the Pennsylvania statute and the relevant decisions of the Pennsylvania and federal courts under that statute, and properly considered all of the cases and authorities cited by the parties. Neither the District Court nor the Circuit Court improperly disregarded a relevant decision of the state appellate court where the decision claimed to have been ignored was not relevant and was never cited to the District Court and was not cited to the Circuit Court in the briefs on appeal.

The question sought to be presented involves no federal question, there is no conflict with any decision of a federal or state court, and was correctly decided below. There is therefore no reason why this Court should grant the Writ, and the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

1800 J. F. Kennedy Blvd.
19th Floor
Philadelphia PA 19103
(215) 587-1000

Allan C. Molotsky
William F. Sullivan, Jr.
POST & SCHELL, P.C.
Attorneys for Respondent
I.T.T. General Corporation